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IN THE

# Supreme Court of the United States

October Term, 1966
No. 468

EDWARD L. LASCHER,

*Petitioner,*

*vs.*

THE STATE OF CALIFORNIA,

*Respondent.*

## Brief for the State of California in Opposition.

### Opinion Below.

The opinion of the Supreme Court of the State of California is reported at 64 A.C. 746, 51 Cal. Rptr. 270, 414 P. 2d 398. (Pet. App. "B" pp. 3-7.)

What petitioner refers to as the unreported memorandum opinion of the trial court (Pet. App. "C" p. 9) is the minute order appearing at page 14 of the Clerk's Transcript. The actual judgment of the trial court appears at pages 15-16 of the Clerk's Transcript.

### Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on May 26, 1966. The order of the Supreme Court of the State of California denying a timely petition for rehearing was entered on June 22, 1966. The petition for a writ of certiorari was filed on August 23, 1966.

Petitioner purports to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). However, as is apparent from the opinion below, the state court decision rests upon an adequate and independent non-federal ground; no federal question was necessarily presented for decision and none was in fact decided. This Court has consistently held that its certiorari jurisdiction over state court decisions does not extend to cases of this nature.

## Questions Presented.

1. Whether the judgment of the Supreme Court of the State of California is based upon an adequate and independent non-federal ground.
2. Whether petitioner's present action is barred by the doctrine of *res judicata*.
3. Whether a substantial federal question is presented by petitioner's contention that an attorney who has been appointed by a state appellate court to represent an indigent criminal appellant and who has received limited compensation under state law is entitled under the Fifth and Fourteenth Amendments to additional "just compensation" under eminent domain standards.

## Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in relevant part, as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part, as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1241 of the California Penal Code, as it existed up to the time of its amendment in 1965, provided in relevant part, as follows:

> "In any case in which counsel has been appointed by the Supreme Court or by a district court of appeal to represent a party to any appeal or proceeding in a criminal matter, the court shall fix a reasonable fee for such counsel which shall be paid from the General Fund. . . ."

## Statement of the Case.

Petitioner, an attorney at law, was appointed by the District Court of Appeal of the State of California, Second Appellate District, as attorney for two indigent criminal appellants in the matter of *People v. Darnold,* 2d Crim. No. 8130.[1] Petitioner performed the duties to which he had been appointed. On August 26, 1963, the District Court affirmed the judgment below, and on October 23, 1963, the California Supreme Court denied the petition for hearing. See *People v. Darnold,* 219 Cal. App. 2d 561, 584, 33 Cal. Rptr. 369. A petition for writ of certiorari was filed on behalf of said criminal appellants by counsel other than petitioner. This court denied the petition for certiorari on February 17, 1964. *Darnold v. California,* 376 U.S. 927.

Thereafter, petitioner, in the name of his clients, applied to the appointing court for "reasonable compensation." On February 25, 1964, the District Court of Appeal, Second Appellate District, pursuant to said application, ordered that reasonable compensation, pursuant

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[1]Petitioner alleges in his complaint that prior to being appointed, he was "requested" to accept an appointment and that petitioner thereupon "acknowledged his willingness to accept such appointment. . . ." [Clk. Tr. p. 2.]

to the provisions of Penal Code section 1241, be paid in the sum of $250. [Clk. Tr. p. 11.] A petition for rehearing and/or reconsideration of this order was filed on February 28, 1964, and subsequently denied. [Clk. Tr. p. 12.] Petitioner then filed with the California Supreme Court a petition for hearing on the order fixing his compensation. This petition for hearing was denied on April 22, 1964. [Clk. Tr. p. 13.] No petition for writ of certiorari was filed with this court from this final order, entered after judgment on the merits by the district court of appeal.

On December 15, 1964, petitioner filed a complaint in the Los Angeles Superior Court based on three causes of action. The first cause of action [Clk. Tr. pp. 1-4] is a *quantum meruit* count for the reasonable value of petitioner's services. The second cause of action [Clk. Tr. pp. 4-5] is for the taking of "valuable property" of petitioner for a "public purpose." The third cause of action [Clk. Tr. pp. 5-6] is for declaratory relief, pursuant to state law, for a declaration of rights arising out of this asserted controversy.

Pursuant to the granting of respondent's motion for judgment on the pleadings, the trial court entered its judgment, finding that each of the first and second causes of action of the complaint failed to state facts sufficient to constitute a cause of action. On the declaratory relief cause of action the court, in the exercise of its discretion under state law (Cal. Code Civ. Proc., §1061), determined that this was a proper case to with-

hold the granting of declaratory relief. [Clk. Tr. pp. 15-16.]

On direct appeal to the California Supreme Court, the court affirmed the judgment of the trial court on the sole ground that the superior court lacked jurisdiction to award petitioner additional compensation for his services as court-appointed counsel in the district court of appeal. *Lascher v. State of Calif.*, 64 A.C. 746. The state supreme court pointed out that the district court of appeal, acting under section 1241 of the California Penal Code, awarded petitioner a sum which that court determined to be reasonable; that petitioner's claim for compensation was passed upon again by that court when it denied his petition for reconsideration and was also passed upon by the state supreme court when it denied his petition for hearing. As, under California law, a lower court is bound by the findings, judgments, orders, and opinions of a higher court (see *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455), the superior court lacked jurisdiction to proceed, since it could not make a further award to petitioner without reviewing the order of the district court of appeal and the order of the state supreme court denying a hearing.

## ARGUMENT.

### I.

### The State Court Judgment Rests Upon an Adequate and Independent Non-Federal Ground.

The decision of the California Supreme Court is clearly based on a non-federal ground, *i.e.*, that the superior court, in which petitioner instituted this action, lacked jurisdiction of the subject matter because a decision by that court would necessarily have entailed review of a previous order of a higher state tribunal, the district court of appeal. This ground is clearly adequate, is independent of the sole federal question petitioner attempted to raise, and is tenable.

In substance, petitioner sought by this action to relitigate in the superior court the order of the district court of appeal made in *People v. Darnold,* on February 25, 1964. The state supreme court, consistent with established state law, see *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 323-324, 369 P. 2d 937, 939-940, and cases cited therein, held that the superior court was without jurisdiction. 64 A.C. at 748-749. Thus, it was clearly unnecessary to, and the state supreme court did not, reach the just compensation issue.

Petitioner has attempted to skirt this broadly tenable non-federal ground upon which the state court judgment rests by his characterization of the holding below: If an indigent's appointed counsel "desires to assert a constitutional claim arising out of the appellate

proceedings, there is no forum in California in which that claim may be asserted as a *matter of right. . . .*" (Pet. p. 11.) What petitioner fails to mention is that his claim has been decided once as a matter of right by the appellate court in *People v. Darnold.* What he seeks by this proceeding is a review of that determination of an appellate court. Review of claims, once adjudicated, as a matter of right must end somewhere. In California the determinations of an intermediate appellate court (much like federal practice) are, for the most part, not reviewable as a matter of right. And surely they should not be reviewable by an inferior trial court. In any event, the constitution does not require that a review be granted as a matter of right. *McKane v. Durston,* 153 U.S. 684, 687 (1894).

It is submitted that the decision below rests upon a broad and tenable state ground, consistent with prior decisions. *McCoy v. Shaw,* 277 U.S. 302 (1928); *Farson, Son & Co. v. Bird,* 248 U.S. 268, 271 (1919). The adequate and independent state ground upon which the judgment below rests, precludes the exercise of this Court's certiorari jurisdiction. *Copperweld Steel Co. v. Industrial Comm'n,* 324 U.S. 780 (1945); *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Eustis v. Bolles,* 150 U.S. 361 (1893); *Northern Pac. R.R. v. Ellis,* 144 U.S. 458 (1892); *Haley v. Breeze,* 144 U.S. 130 (1892).

The petition for writ of certiorari should be denied on this ground alone.

## II.

## The Order of the District Court of Appeal Awarding Reasonable Compensation Is Res Judicata.

Petitioner appears also to have mistaken his remedy before this Court. If he believed that the final order of the district court of appeal of February 25, 1964, involved the drawing into question of any federal right claimed by him his remedy was to file a timely petition for writ of certiorari after the denial of a hearing by the state supreme court. Although the order was made in chambers upon an *ex parte* application it was undoubtedly a final judgment or decree in the matter "rendered by the highest court of a State in which a decision could be had," within the meaning of the Judicial Code. 28 U.S.C. §1257. See *Betts v. Brady*, 316 U.S. 455, 458-461 (1962). However, petitioner chose not to seek certiorari from the order awarding him reasonable compensation—from the proceeding in which his claim was heard and determined as a matter of right.

Under these circumstances it is submitted that petitioner is now barred by the doctrine of *res judicata*. *Angel v. Bullington*, 330 U.S. 183 (1947); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The grounds now being urged by petitioner as constituting error by the district court of appeal in awarding him less compensation than be demanded were available to him in the prior proceeding and were, in fact, urged by him as grounds for reconsideration and for a hearing by the state supreme court on the prior order. (Petition for Rehearing and/or Reconsideration; Petition for Hearing.) *Cf.*, *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 479 (1930).

What petitioner is now urging, in essence, is that the order of the district court of appeal of February 25, 1964, is based upon an erroneous view of the law. Yet he chose not to seek certiorari, from that order; having failed to seek direct review he cannot now collaterally attack that order by a new action.

> ". . . Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause. [Citations omitted.]"
>
> *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 325 (1927).

## III.

## There Was No "Taking" of Petitioner's Services and That Which Is Alleged to Have Been Taken Is Not a Compensable Property Interest.

Petitioner's complaint in the trial court presented only a single constitutional question, whether or not there had been a taking of his services for a public use without just compensation under the Fifth Amendment. [Clk. Tr. pp. 4-5.] Petitioner's contention that the failure of the California District Court of Appeal to compensate him in accordance with the eminent domain standard of just compensation or "fair market value" is neither meritorious nor of sufficient substantiality; furthermore, petitioner's contention is not in accord with applicable decisions of this Court.

This Court has stated that, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell v. Alabama,* 287 U.S. 43, 73 (1932). Citing *Powell,* the Ninth Circuit has recently held that there is no "taking", in the constitutional sense, when an attorney is called upon to perform "an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice." *United States v. Dillon,* 346 F. 2d 633, 636 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (prelim. print 1966). Respondent is aware of no case to the contrary decided under the Fifth Amendment to the United States Constitution.

Moreover, a lawyer's "professional time" and "professional services" are not "property" within the meaning of the just compensation clause of the Fifth Amendment. It is well established that when that which has been taken is not property the loss is not compensable under the principle of just compensation. Government conscription of personal services is not governed by eminent domain.

> "The power of calling upon inhabitants whose services are particularly needed to perform those services is still recognized as an attribute of sovereignty. Thus, in England and some of the older states in America, members of a municipal corporation may be compelled to accept municipal offices, even without compensation. Other familiar examples of the power are the compulsory attendance of witnesses and jurors in court, and the drafting of soldiers. . . .

> "Although it is necessary to provide compensation in such cases, the stipened allowed is given as a matter of policy, to keep the persons whose services have been required and their families from starvation, rather than as a constitutional obligation. At any rate the compensation is awarded upon a different principle from that employed when property is taken by eminent domain, as the method sanctioned by ancient practice is to pay all persons alike, regardless of what their time, or services may be worth. A statute applying the same method to eminent domain and fixing a uniform price for land taken for the public use, regardless of its actual value, would be clearly unconstitutional." (Footnotes omitted.)
>
> 1 Nichols, Eminent Domain, §1.4[3] (3d Ed., 1964).

Petitioner in the case at bar has received the stipend allowed under state law, as construed by a state court. He is constitutionally entitled to no more. *Selective Draft Law Cases,* 245 U.S. 366 (1918); *Butler v. Perry,* 240 U.S. 328 (1916); *Robertson v. Baldwin,* 165 U.S. 275 (1897).

The indigent's right to counsel is a rapidly evolving area of the law. How best to meet the needs in this area is essentially a matter of legislative concern, involving complex legislative judgments. The process of legislative response has already begun. *E.g.,* Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. §3006A; N. Y. Sess. Laws, 1965, ch. 878, N.Y. County Law, §§722-722(e); Cal. Stats. 1965, ch. 1410 (amending Cal. Pen. Code, §1241). Therefore, it would appear to be particularly undesirable to "freeze" the development of this

area in the rigid constitutional requirements of just compensation. To do so would foreclose any meaningful choice of policy and would draw into serious question the constitutionality of recent legislation, both federal and state, in this area. See Comment, 49 Minn. L. Rev. 553, 558 (1965); Comment, 113 U. Pa. L. Rev. 769, 770 (1965); Note, 12 U.C.L.A. L. Rev. 668, 676-77 (1965).

This question is not of sufficient substantiality to require review by this Court.

## IV.

## No Other Federal Questions Are Properly Presented.

Petitioner asserts that one of the questions presented by his petition is, "Whether the equal protection or due process clauses of the Fourteenth Amendment prohibit a state from placing a burden upon, or impairment of, the effectiveness of appointed counsel's representation of an indigent who is appealing from a state felony conviction, . . ." (Pet. p. 2.) It is submitted that this question was not presented by petitioner's complaint in the trial court, and even if the complaint could be construed as attempting to present this question, petitioner is without standing to raise it.

As petitioner himself states, "This is an action by an attorney, seeking compensation for services rendered. . . ." (Pet. p. 3.) This is *not* a petition of an indigent appellant claiming that he was deprived of effective representation by his appointed counsel. Whether

or not appointed counsel performed his representation effectively can only be raised by the indigent, it is his right—not the right of the attorney. See *State v. Rush*, 46 N.J. 399, 217 A. 2d 441, 444 (1966).

As previously noted, the indigents whom petitioner has represented in the state appellate courts petitioned this court for a writ of certiorari to review their state conviction. Nowhere in their lengthy petition of 21 pages (filed by other counsel) is the issue of the effectiveness of appointed counsel's representation before the state appellate court mentioned. See Petition for Writ of Certiorari, *William Henry Darnold and John Lenahan, Petitioners v. People of the State of California, Respondent*, No. 925 Misc., October Term, 1963. That proceeding has long since become final and, in any event, petitioner herein has no standing to raise this issue in this action.

The complaint in this action is framed in terms of the appointed counsel's right to compensation (and prays for money damages), not in terms of the indigent's right to effective representation. No allegation in the complaint even remotely suggests the presence of this latter issue in this case. No such issue being raised in the first instance, it follows that the issue was not before the state supreme court for review. The issue was not properly raised in the trial court and petitioner, in any event, obviously has no standing to raise it. It cannot properly be brought before this Court for "review" on certiorari.

## Conclusion.

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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